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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 478.

MOSES W. GRAY, APPELLANT,

vs.

WILLIAM E. ROLLO, ASSIGNEE IN BANKRUPTCY OF THE ESTATE OF THE MERCHANTS' INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 20, 1873.

OCT 2, 1873

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, in chancery before the judges thereof, on Tuesday, the third day of December, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-seventh year.

WILLIAM H. BRADLEY, *Clerk.*

MOSES W. GRAY, COMPLAINANT,
vs.
WILLIAM E. ROLLO, ASSIGNEE IN BANKRUPTCY of the Merchants' Insurance Company of Chicago, defendants. } 10398. In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, on the twenty-fourth day of June, A. D. eighteen hundred and seventy-two, said complainant by his solicitor, filed in the office of the clerk of said court at Chicago, in said district, his bill of complaint against said defendant, and also his bond for
2 costs in said entitled cause, which said bond and bill are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, May term, A. D. 1872.

MOSES W. GRAY
vs.
WILLIAM E. ROLLO. } In chancery.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution, may issue against my property for any costs taxed against me. Dated this 24 day of June, A. D. 1872.

CHA'S E. TOWNE.

(Indorsed:) Filed June 24th, A. D. 1872. W'm H. Bradley, clerk.

Bill of compl't.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, May term, A. D. 1872.

To the honorable, the judges of the circuit court of the United
3 States for the northern district of Illinois.

Humbly complaining, showeth unto your honors, your orator, Moses W. Gray, of the city of Chicago, in the county of Cook, and State of

Illinois, that, on or about the thirtieth day of April, in the year of our Lord one thousand eight hundred and seventy-one, together with one Frederick Gaylord, he executed two certain promissory notes bearing date the said 30th day of April, A. D. 1871, each for the sum of five thousand five hundred fifty-five dollars and fifty-five cents, (5,555.55;) one due on the eighteenth day of September, A. D. 1872, and the other on the eighteenth day of September, A. D. 1873; both of said notes being payable to the order of E. S. Fowler, and the payment secured by a trust deed executed by your orator and said Frederick Gaylord, upon the following described property, to wit: Lots number one (1) and two (2) in the west half of block number sixty-two (62) of Hopkins' Addition Hyde Park, and that said promissory notes were, before October 9, 1871, endorsed by the said E. S. Fowler and sold to the Merchants' Insurance Company, a corporation created and lately doing business
4 under and by virtue of the laws of Illinois, now a bankrupt; and that said notes are now owned by said insurance company, and constitute a portion of the assets of said company, in the hands of its assignee in bankruptcy.

And your orator further shows unto your honors that he now is, and at the time of the issuing the policies of insurance hereinafter mentioned was, a member of the firm of "Gray Brothers," which said firm is composed of Franklin D. Gray and your orator, and is engaged in business in said city of Chicago, and that your orator is an equal partner in the same. That, on the 18th day of April, A. D. 1870, the said Merchants' Insurance Company issued its certain policy of insurance, No. 26036, to your orator's said firm of Gray Brothers, for the sum of ten thousand ($10,000) dollars, insuring said Gray Brothers against loss by fire upon their stock of groceries contained in the brick building Nos. 64 & 66 Michigan avenue, in said Chicago, from the 18th day of April, A. D. 1870, till the 18th day of April, A. D. 1871; and that afterwards, by a certificate of renewal, said policy of insurance was continued in force till the 18th day of April, A. D. 1872.

5 That, on the 9th day of June, A. D. 1871, said Merchants' Insurance Company issued its certain policy of insurance, No. 32144, to your orator's said firm of Gray Brothers, for the sum of ten thousand ($1,000) dollars, insuring said Gray Brothers against loss or damage by fire upon their stock of groceries contained in the brick building situated Nos. 64 & 66 Michigan avenue, in said Chicago, from the 9th day of June, A. D. 1871, till the 9th day of June, A. D. 1872.

That, on the 30th day of September, A. D. 1871, said Merchants' Insurance Company issued to your orator's said firm of Gray Brothers, an open policy of insurance for ten thousand dollars, upon merchandise in store in the Empire warehouse in said Chicago, insuring said Gray Brothers against loss or damage by fire upon merchandise owned by them in said warehouse, from the 30th day of September, A. D. 1871, till the 30th day of November, A. D. 1871.

That on the 8th and 9th days of October, A. D. 1871, and while said policies of insurance were in force, the property insured was destroyed by fire, and that said Gray Brothers suffered loss under said policies of insurance to the amount of thirty thousand dollars; that proofs
6 of loss under said policies were duly presented to said Merchants' Insurance Company, and accepted by said company, and that the said Merchants' Insurance Company is now indebted to said firm of Gray Brothers to the amount of thirty thousand dollars.

And your orator further shows unto your honors that the said Merchants Insurance Company, on or about the 18th day of December, A.

D. 1871, upon a petition in bankruptcy filed in the district court of the United States for the northern district of Illinois, was duly adjudged a bankrupt, and a warrant was duly issued by said court to the marshal of said district, directing him to take possession of the estate of the said bankrupt; and that afterwards, and on or about the 11 day of April, A. D. 1872, William E. Rollo was duly elected and appointed assignee of the estate of said bankrupt, and now holds the estate as such assignee by virtue of a deed of conveyance executed and delivered to him as such assignee, under the hand and seal of Homer N. Hibbard, one of the registers of said court in said district, and has accepted
7 the trust and entered upon the execution of the same.

And your orator further shows unto your honors that the sum of five thousand five hundred and fifty-five dollars and fifty-five cents, ($5,555.55,) with interest thereon, which your orator is equitably responsible for and bound to pay on said promissory notes to the said Merchants' Insurance Company, and the said sum of thirty thousand dollars due from the said Merchants' Insurance Company to the firm of Gray Brothers, in which firm your orator is an equal partner, for losses under said policies of insurance constitute mutual debts and credits between your orator and said Merchants' Insurance Company, and that your orator is entitled, under the provisions of the bankrupt law, to have the amount equitably due on said promissory notes from your orator to said insurance company, set off as against an equal amount of the indebtedness due from said insurance company to said firm of Gray Brothers, in which your orator is an equal partner, said proposed
8 set-off being assented to and authorized by Franklin D. Gray, the other partner in said firm.

And your orator further shows unto your honors that application has been made by your orator to said William E. Rollo, the assignee in bankruptcy of said company, to set-off the amount of mutual debts and mutual credits due between your orator and the said Merchants' Insurance Company, said Franklin D. Gray consenting to said set-off, but that the said assignee refuses so to do, and denies the right of your orator to set off said mutual debts and credits.

And your orator further shows that the said assignee threatens to sell and transfer the said notes, and that unless enjoined he will assign and transfer the same, and by such transfer deprive your orator of the right of set-off, which he now has against said company, to the irreparable injury of your orator.

To the end therefore that the said William E. Rollo, whom your orator makes party defendant to this bill, may, if he can, show
9 why your orator should not have the relief hereby prayed, and may according to the best of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here again repeated, without oath, (the oath being hereby expressly waived); and that an account may be taken by and under the direction and decree of this honorable court of the amount equitably due from your orator to said insurance company upon said promissory notes, and of the amount due to your orator's said firm of Gray Brothers, from said insurance company, by reason of losses under said policies of insurance; and that said mutual debts may be by decree of this court declared off sets within the meaning of the bankrupt law, and that the said assignee may be ordered and decreed to set-off and allow the amount so found to be equitably due from your orator to said company against an equal amount of the indebtedness of said

10 company to said firm of Gray Brothers; and that the said William E. Rollo, his attorneys and agents, may be restrained by an injunction issuing out of this court, from selling, assigning, transferring, or in any manner disposing of said promissory notes, or either of them; and that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require, and as to your honor shall seem meet.

May it please your honors to grant unto your orator not only a writ of injunction issuing out of and under the seal of this honorable court, to be directed unto the said William E. Rollo, to restrain him, his attorneys and agents, from selling, assigning, transferring, or in any manner disposing of said promissory notes or either of them, but also a writ of subpœna to be directed to the said William E. Rollo, thereby commanding him at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court, and then
11 and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem agreeable to equity and good conscience.

MOSES W. GRAY,
By CHA'S E. TOWNE,
His Sol'r.

CHA'S E. TOWNE,
Of Counsel.

(Endorsed:) Filed June 24, 1872. W'm H. Bradley, cl'k.

On the same day, to wit, the 24th day of June, A. D. 1872, a writ of subpœna issued out of said clerk's office against said defendant in said entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to William E. Rollo, assignee in
12 bankruptcy of the Merchants' Insurance Company of Chicago, greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago in said district, on the first Monday in the month of August next, to answer the bill of complaint of Moses W. Gray this day filed in the clerk's office of said court in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this twenty-fourth day of June, in the year of our Lord, one thousand eight hundred and seventy-two, and of our Independence the ninety-sixth.

[SEAL.] W'M H. BRADLEY, *Clerk.*

13 MEMORANDUM.—The above-named defendant is notified that unless he shall enter his appearance in the clerk's office of said

court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against him as confessed, and a decree entered accordingly.

W'M H. BRADLEY, *Clerk.*

I served the within subpœna upon W'm E. Rollo, assignee in bankruptcy of the Merchants' Insurance Company therein named, by delivering a true copy thereof to him personally, on the 25th day of June, A. D. 1872.

B. H. CAMPBELL, *U. S. Marshal.*
By S. H. TOURTELLOTTE, *Deputy.*

(Endorsed:) Filed June 27th, A. D. 1872. W'm H. Bradley, clerk.

On this day, to wit, the 6th day of July, A. D. 1872, said defendant, by his solicitors, filed in said clerk's office his demurrer in said entitled cause; which said demurrer is in words and figures following, to wit:

14 *Demurrer.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:
In the circuit court of the United States, August term, A. D. 1872.

MOSES W. GRAY
vs.
WILLIAM E. ROLLO, ASSIGNEE IN BANKRUPTCY of the Merchants' Insurance Company of Chicago, a bankrupt. } In equity.

The demurrer of William E. Rollo, assignee in bankruptcy of the Merchants Insurance Company of Chicago, a bankrupt, to the bill of complaint of Moses W. Gray, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereto, and for cause of demurrer shows that the said complainant hath not, by his said bill, made such a case as entitles him in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said bill,
15 or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur to the said bill, and to all the matters and things therein contained, and humbly prays the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill; and he prays to be hence dismissed, with his reasonable costs in this behalf sustained.

WILLIAM E. ROLLO,
Assignee in Bankruptcy of the Merchants' Insurance Company of Chicago, a bankrupt.
By McCAGG, FULLER & CULVER,
His Solicitors.

McCAGG, FULLER & CULVER,
Solicitor for said Defendant.
SAM'L W. FULLER,
Of Counsel for said Defendant:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

16 William E. Rollo, assignee in bankruptcy of the Merchants' Insurance Company of Chicago, a bankrupt, being duly sworn, doth depose and say that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

WM E. ROLLO,
Assignee in Bankruptcy of the Merchants' Insurance Company of Chicago, a Bankrupt.

Subscribed and sworn to before me this sixth day of July, A. D. 1872.
[SEAL.] GEO. A. IVES,
Notary Public.

We certify that, in our opinion, the foregoing demurrer of William E. Rollo, assignee in bankruptcy of the Merchants' Insurance Company of Chicago, a bankrupt, defendant to the bill of complaint of Moses W. Gray, complainant, is well founded in law and proper to be filed in the above cause.

McCAGG, FULLER & CULVER,
Solicitors for said Defendant William E. Rollo, assignee in bankruptcy of the Merchants' Insurance Company of Chicago, a Bankrupt.

17 (Endorsed:) Filed July 6, 1872. W'm H. Bradley, cl'k.

On this day, to wit, the 22d day of November, A. D. 1872, in the record of the proceedings of said court in chancery in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

Demurrer heard.

MOSES W. GRAY
v.
WILLIAM E. ROLLO, ASSIGNEE. } Chancery.

Now come the parties, by their solicitors, and thereupon the demurrer of the defendant to the bill of complaint filed herein is submitted to the court upon written arguments and taken under advisement.

Afterwards, to wit, on the 3d day of December, A. D. 1872, in the record of the proceedings of said court in chancery in said entitled cause before the Hon. Henry W. Blodgett, judge, appears the following entry to wit:

18 *Decree.*

MOSES E. GRAY
v.
WILLIAM E. ROLLO, ASSIGNEE IN BANKRUPTcy of the Merchants' Insurance Company of Chicago. } Chancery.

The court having considered and being now fully advised upon the demurrer of the defendant to the bill of complaint herein, sustains the same, and the complainant, electing to abide by his said bill, it is ordered that the same be dismissed at the costs of the complainant.

It is thereupon considered and adjudged by the court, that the defendant do have and recover of the complainant his costs in this behalf expended, amounting to the sum of twelve dollars and eighty cents *cents*, and that he have execution therefor.

On this day, to wit, the 28th day of January, A. D. 1873, in the record of the proceedings of said court in chancery before the Hon. Henry W. Blodgett, judge, in said entitled cause is the following entry, to wit:

19 *Order allowing appeal.*

MOSES W. GRAY
vs.
WILLIAM E. ROLLO, ASSIGNEE IN BANKRUPTCY of The Merchants' Insurance Company of Chicago. } Chancery.

Now comes the complainant, by his solicitor, and prays an appeal to the Supreme Court, which is allowed upon the complainant giving bond in the penal sum of one thousand dollars, with surety to be approved by the court.

On this day, to wit, the 28th day of January, A. D. 1873, said complainant, by his solicitor, filed in said clerk's office his appeal bond in said entitled cause; which said bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, Moses W. Gray, as principal, and Franklin D. Gray, as surety, both of the city of Chicago, in the county of Cook and State of Illinois, are held and firmly bound unto
William E. Rollo, assignee in bankruptcy of the estate of the
20 Merchants' Insurance Company, in the penal sum of one thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we, jointly and severally, bind ourselves, our heirs, and administrators, firmly by these presents. Witness our hands and seals, this twenty-first day of January, A. D. 1873.

The condition of the above obligation is such that, whereas the above-bounden Moses W. Gray did, on the 24th day of June, A. D. 1872, file in the circuit court of the United States for the northern district of Illinois a bill in chancery, making the said William E. Rollo, assignee, defendant, and praying that the sum of money equitably due from said Moses W. Gray on certain promissory notes owned by the said Merchants' Insurance Company, at the time of its bankruptcy, and constituting part of the assets in the hands of said Rollo, assignee, might be set off against an equal amount of the indebtedness of said insurance company to the firm of Gray Brothers.

And whereas, on the 3d day of December, A. D. 1872, a decree
21 was entered in said court dismissing said bill, from which said decree the said Moses W. Gray has taken an appeal to the Supreme Court of the United States:

Now, if the said Moses W. Gray shall prosecute his appeal with effect, and shall pay all costs and damages which may accrue to the said William E. Rollo, assignee, or to the officers of the court, upon the dismissal of

said appeal, then the above obligation to be void; otherwise to remain in full force and effect.

MOSES W. GRAY. [SEAL.]
FRANKLIN D. GRAY. [SEAL.]

Approved. H. W. BLODGETT, *Judge.*

The above bond is satisfactory to us.

McCAGG, FULLER & CULVER,
Att'ys for W'm E Rollo, Assignee, &c.

CHICAGO, *Jan'y* 27, 1873.

(Endorsed:) Filed Jan'y 28, 1873. W'M H. BRADLEY, *Clk.*

22 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify that the above and foregoing is a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause in chancery, wherein Moses W. Gray is complainant, and William E. Rollo, assignee, &c., is defendant, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in the city of Chicago, in said district, this twenty-sixth day of May, A. D. 1873, and of our Independence the 97th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

UNITED STATES OF AMERICA:

To William E. Rollo, assignee in bankruptcy of the estate of the Merchants' Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to an appeal prayed and allowed in the circuit court of the United States for the northern district of Illinois, on the 28th day of January, A. D. 1873, wherein Moses W. Gray is the appellant, and you are appellee, to show cause, if any there be, why a decree rendered against the said appellant in said suit mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

23 Witness the honorable Henry W. Blodgett, a member of and sitting as judge of the circuit court of the United States for the northern district of Illinois, this 14th day of June, in the year of our Lord one thousand eight hundred and seventy-three.

H. W. BLODGETT, *Judge.*

Service of foregoing citation accepted by us, a copy of the same having been delivered to us this 21st day of June, A. D. 1873.

McCAGG, FULLER & CULVER,
Counsel for W. E. Rollo.

(Endorsed:) Moses W. Gray, appellant, v. William E. Rollo, assignee, &c., appellee. Citation.

(Indorsement on cover:) No. 478. Moses W. Gray, appellant, vs. William E. Rollo, assignee in bankruptcy of the estate of the Merchants' Insurance Company. N. Illinois C. C. U. S. Filed 20th September, 1873.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1873.

MOSES W. GRAY,
Appellant,
vs.
WILLIAM E. ROLLO,
Assignee, &c.,
Appellee.

In Chancery.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT,

BY JAMES S. NORTON,

Counsel for Appellant.

Jameson & Morse, Printers, 162 & 164 Clark St., Chicago.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1873.

MOSES W. GRAY,
Appellant,
vs.
WILLIAM E. ROLLO,
Assignee, &c.,
Appellee.

In Chancery.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT.

Statement of the Case.

The appellant originally filed his Bill in Chancery in the Circuit Court of the United States, for the Northern District of Illinois, against William E. Rollo, Assignee in Bankruptcy of the Merchants' Insurance Company, praying to be allowed to set off the sum of $5,555 55, equitably due from appellant to said assignee, against an equal amount of indebtedness due from said assignee to the firm of Gray Brothers, in which said firm, appellant is an equal partner.

The material allegations of the bill are: That appellant, together with one Frederick W. Gaylord, on or about the 30th day of April,

A. D. 1871, executed their two certain promissory notes, each for the sum of $5,555 55, one due September 18, A. D. 1872, and one due September 18, A. D. 1873, both of said notes being payable to one E. S. Fowler; that said notes were endorsed by said Fowler, and sold to the Merchants' Insurance Company, before it became bankrupt, and constituted a portion of the assets of said Company, in the hands of its assignee in bankruptcy.

That on the 8th and 9th days of October, A. D. 1871, the firm of Gray Brothers, which is composed of Franklin D. Gray and appellant, and in which they are equal partners, suffered losses to the amount of $30,000 under policies of Insurance issued to said firm by the Merchants' Insurance Company; that such loss was admitted by the Company, and that on the date when said Insurance Company became bankrupt, it was indebted to said firm of Gray Brothers in the sum of $30,000.

That appellant is equitably bound to pay to the said assignee one-half of the amount evidenced by the said two promissory notes, or $5,555 55, with interest thereon from the 30th day of April, A. D. 1871; that the said Merchants' Insurance Company is indebted to the firm of Gray Brothers, of which firm appellant is an equal partner in the sum of $30,000, and that appellant is equitably entitled under the provisions of the bankrupt act, to have the sum of $5,555 55 with interest thereon, which appellant is equitably bound to pay to said assignee, set off against an equal amount of the indebtedness due from the said assignee to the firm of Gray Brothers, said proposed application of the amount due on such policies of Insurance being assented to and authorized by Franklin D. Gray, the other partner in said firm.

(Record, pages 2 and 3.)

To this bill the appellee filed a general demurrer, and on hearing, the Court sustained the demurrer, and entered a decree dismissing the bill.

Assignment of Errors.

The errors relied on are the sustaining of the demurrer by the Court and the dismissal of the bill, thus disallowing the set off.

Brief and Argument.

The debt which the appellant owes to the assignee in bankruptcy, evidenced by the two promissory notes signed by Gaylord and himself, is a *several* as well as a joint obligation; it is made so by the statute of Illinois, in which State the notes were executed.

"All joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants."

1 *Gross' Stat. of Illinois*, 377.

This is true of the entire amount of both notes, but it would be inequitable and unjust that Gaylord's debt should be paid by the application of a policy of Insurance in which he had no interest whatever, and the appellant therefore only asks that his share of the notes may be brought into the adjustment. The appellant is severally indebted therefore to the assignee in at least the sum of $5,555 55, and this sum only he prays may be set off against an equal amount due from the assignee on the policies of Insurance issued to the firm of Gray Brothers. The appellant is indebted to the assignee, the assignee is indebted to the appellant, and the debts are mutual; there would seem to be no reason to deny the set off under the clause of the bankrupt act requiring the set off of mutual debts. The only reason given by the Court below, or urged by the counsel for the appellee is the technical restriction of the word "mutual" to the case of debts existing in the same right. The word has sometimes received this construction; at other times, and construed by other Courts, it has received a broader and more liberal meaning, and the technical mutuality required in actions at law has been disregarded. In this case the debt due from the assignee is not due to the appellant as an individual, but as a member of the firm of Gray Brothers, and is due technically to the firm, and not to either or both of the persons composing the firm. This is the ground and the only ground upon which this application is resisted. The broader and more liberal construction of the word mutual, and the more extended application of the principle of set off has been adopted in England in some of the cases,

by this Court in one case, and the only case of set off in bankruptcy ever brought before it, and by a long line of decisions in the State of Pennsylvania. Upon the authority of these cases, and upon the natural justice of the doctrine of set off in cases of insolvency, we urge that the prayer of the bill should be granted.

The case of *Tucker* vs. *Oxley*, 5 Cranch, 34, is a direct authority in favor of the principle contended for by the appellant. In that case the technical mutuality did not exist, the debts were in different rights, and yet the Court under the bankrupt act of 1800 which is substantially like the act of 1867, directed the set off to be made. The only other case in this Court upon this question so far as we have been able to discover is *Dade* vs. *Irwin's Executor*, 2 How., 383. But this was not a case in baukruptcy, nor were the debts in different rights. The Court declined to direct the off set simply because the debts were not connected, and because the claim sought to be set off was stale and suspicious. The question of mutuality did not arise.

In the Supreme Court of Pennsylvania this question has been often litigated and the result has uniformly been the allowance of the set off in cases of this character. The statute governing the case is as follows. We quote it in full in order that the application of the decisions may be clearly seen :

"If two or more dealing together be indebted to each other, upon bonds, bills, bargains, promises, accounts, or the like, and one of them commence an action in any Court of this province, if the defendant cannot gainsay the deed, bargain, or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or part of the debt or sum demanded, and give any bond, bill, receipt, account or bargain in evidence, and if it shall appear that the defendant hath fully paid or satisfied the debt or sum demanded, the jury shall find for the defendant, and judgment shall be entered that the plaintiff shall take nothing by his writ and shall pay the costs. And if it shall appear that any part of the sum demanded be paid, then so much as is found to be paid shall be defalked, and the plaintiff shall have judgment for

the residue only with costs of suit. But if it appears to the jury that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the Court how much they find the plaintiff to be indebted or in arrears to the defendant more than will answer the debt or sum demanded, and the sum or sums so certified shall be recorded with the verdict, and shall be deemed as a debt of record, and if the plaintiff refuse to pay the same, the defendant for recovery thereof, shall have a *scire facias* against the plaintiff in said action, and have execution for the same with the costs of that action."

1 *Brightley's Purdon's Dig.*, 487.

In *Wrenshall* vs. *Cook*, 7 Watts, 464, suit was brought against Wrenshall who sought to set up a claim of the firm Shoenberger, Wrenshall & Co., of which he was a member, against the plaintiff by way of set-off; it appearing that the other partners consented to the arrangement. The Court held that while the technical rules of law would not permit the plea or evidence, the principles of equity which were there administered would allow and justify it.

This is precisely our case. The appellant is in the exact position of Wrenshall. He seeks to set off a debt due from the assignee to the firm of which he is a member, and his partner consents to the arrangement. (Record, page 3.)

There are numerous other cases in that State to the same effect, but we need only to refer to

Tustin vs. *Cameron*, 5 Wharton, 379.
Craig vs. *Henderson*, 2 Barr., 261.
Solliday vs. *Bissey*, 2 Jones, 347.
Smith vs. *Myler*, 10 Harris, 36.

The statute under which these decisions were made is no broader than our act of bankruptcy. "If two or more dealing together be indebted to each other upon bonds, bills, &c.," is certainly capable of no more extended application of the principle of set off than "in all cases of mutual debts or mutual credits between the parties." These

cases cannot be successfully attacked upon principle; some of the authorities, particularly in England, we admit to be opposed to them. The authority of this Court however, so far as it has been promulgated, is on the side of the Pennsylvania cases. *Tucker* vs. *Oxley*, supra.

The Supreme Court of Kentucky seem to have adopted the same principle in the construction of the statute of set off by Courts of Equity, as that of Pennsylvania, and hold that the insolvency of one of the parties is of itself a reason for the application of the doctrine.

Collins vs. *Farquar*, 4 Litt., 154.
Robbins vs. *Hawley*, 1 Monroe, 194.
Prior vs. *Richards*, Adm'r, 4 Bibb, 356.

See also *Sarchet* vs. *Sarchet*, 2 Hammond, Ohio, 320.

Lindsay vs. *Jackson*, 2 Paige's Ch., 580.
Pond vs. *Smith*, 4 Conn. 297.
The *Receivers &c.* vs. *Patterson Gas Light Co.*, 2 Zabriskie, 283.

In England the cases have not been uniformly decided. The earlier cases seem to recognize the propriety of applying equitable principles to the administration of this statute, while the later cases may perhaps be regarded as leaning in the opposite direction. In *Ex parte Edwards* 1 Atk., 100. Lord Hardwicke was of opinion that the want of technical mutuality in the debts, in the sense of being in the same right, was not essential to the set off.

In *Lanesboro* vs. *Jones*, 1 P. Wms., 326, the Court say: "But it "seems if A. and B. are joint traders, and J. S. owes A. and B. on "their joint account £100, and A. owes the said J. S. £100 on his "separate account, J. S. cannot deduct so much as A's proportion of "the £100 comes to out of the joint debt; for that the partnership "debts of A. and B. are first to be paid before any of the separate "debts: *but if there be a surplus beyond what will pay the partnership "debts, then out of A's share of the surplus J. S. may deduct the "separate debt of A.*"

This is a clear recognition of the principle for which we contend. But if the technical rule urged by the counsel for the appellee were adopted, neither J. S. nor A. could make any set off at any time, for the debts do not exist in the same right. If J. S. were a bankrupt, the counsel would contend for his assignee as he does here, that A. should pay his debt in full and take a pitiful dividend from the estate of J. S., because there would be a lack of mutuality in the debts. The Court was of the opposite opinion.

That case illustrates the difficulties which seem to have prevented some of the English Courts from doing full justice in the way of set off, arising from the settlement of partnership estates in bankruptcy. The equities in favor of the partnership creditors to be paid out of the partnership assets, and the separate creditors out of the separate estate of the partners, made it difficult to adjust the rights of all parties if a set off were allowed, except in cases of the strictest mutuality; but as the Court says in *Lanesboro* vs. *Jones*, when this difficulty is removed by the payment of all partnership debts, there is no reason why the set off should not be allowed, notwithstanding the technical mutuality; there being *in fact* a perfect mutuality.

This difficulty explains the remark of Lord Eldon in *Ex parte Twogood*, 11 Vesey, Jr., 519, where he says: "But if there are debts "which cannot be set off at law, can it be said that all the affairs of "bankruptcy are to be suspended until all the accounts are cleared in "order to see what rights of set off there may be in the result." If there were any such difficulties in the case at bar, we should not urge a set off; the difficulty if not impossibility of adjusting it would be abundant reason for denying it. But there are no such difficulties here. No partnership is in bankruptcy, and there are no equities of joint or separate creditors to be settled. Gaylord and Gray and the firm of Gray Brothers are abundantly solvent, and neither Gaylord nor his creditors, if he had any, are affected by this transaction. F. D. Gray, the partner in the firm of Gray Brothers, is only affected by the application of a certain portion of the partnership assets, and to this application he has expressly given his consent as required by the

Courts of Pennsylvania. There is no practical difficulty whatever, in the way of this set off.

In *Ex parte Quintin*, 3 Vesey, Jr., 248, *Ex parte Stephens*, 11 Vesey, Jr., 24, and in *Ex parte Hauson*, 18 Vesey, Jr., 232, the Court allowed a set off in cases like the present, although the technical mutuality required in suits at law did not exist.

This case cannot be said to be already determined by authority; there are cases upon both sides. The question is new in this Court except as considered in the case of *Tucker* vs. *Oxley*, and no decision of it has been made by this Court so far as we know, under the statute of 1867. If the justice and propriety of a set off in ordinary cases of bankruptcy is admitted, it will be very difficult to demonstrate the absence of those elements in this case. In all cases the creditor of a bankrupt who is also a debtor, receives his debt in full by the operation of the set off, while the other creditors take whatever dividend there may be. But the equity of the general doctrine is not now open to discussion. This law, like all its predecessors in this country, as well as nearly all those in England, provides for a set off of debts, and the principle must be regarded as a favorite of the law-making power. This principle conceded, why is not the appellant entitled to the benefit of it. He is severally indebted to the appellee, as he was to the bankrupt, at least to the amount of $5,555 55. The bankrupt was indebted to the firm of which he is an equal member with his brother in the sum of $30,000. It is a case of mutual debt and credit. The strict rules of law do not permit the set off because a partnership is regarded as distinct from the persons composing it. A partner cannot bring a suit for a firm debt, although he may own it all, nor can one partner sue another at law. But in equity it is not so. The *facts* and the actual condition of things is regarded, rather than the forms of pleading. It is not of course denied by the counsel for the appellee, that *as a matter of fact* these debts, to the extent of our claim of set off, are absolutely mutual. Neither is there any difficulty in the way of this adjustment, except the dry rule of law as to debts in the same right. But equity will lend its aid to support the right of set off against a bank-

rupt or insolvent whenever justice requires its interposition. In the case of *Dade* vs. *Irwin*, so much relied on by the appellee, Mr. Justice Story did not deny that insolvency alone was a sufficient reason for the interference of equity. We have no hesitation in saying that if there is any justice in a set off of mutual debts in bankruptcy in ordinary cases, that same justice requires a set off in this case.

JAMES S. NORTON,

Counsel for Appellant.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1873.

MOSES W. GRAY, Appellant,
vs.
WILLIAM E. ROLLO, Assignee in Bankruptcy of the Estate of the Merchants Insurance Company, Appellee.
No. 478.

BRIEF FOR APPELLEE.

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Counsel for Appellee.

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In the Supreme Court of the United States,

OCTOBER TERM, A. D. 1873.

MOSES W. GRAY, APPELLANT,
vs.
WILLIAM E. ROLLO, ASSIGNEE IN BANKRUPTCY OF THE ESTATE OF THE MERCHANTS INSURANCE COMPANY, APPELLEE.
No. 478.

BRIEF FOR APPELLEE.

The questions in this case arose in the Circuit Court upon demurrer to the appellant's bill of complaint, filed against the appellee, June 24, 1872; the Circuit Court, upon argument of the demurrer, sustained it, and the complainant having elected to abide by his bill, it was dismissed, whereupon he prosecuted this appeal.

The Merchants Insurance Company of Chicago, by reason of extensive losses in the fire which destroyed a great portion of the City of Chicago, on the 8th and 9th days of October, 1871, became insolvent, and on the 18th day of December, 1871, was adjudicated a bankrupt, William E. Rollo being elected and appointed its assignee in bankruptcy, April, 11, 1872.

Among the assets of the bankrupt which came into the hands of the assignee, were two promissory notes, executed by Moses W. Gray, the appellant, and one Frederick Gaylord, for the sum of $5,555.55 each, both dated April 30, 1871, both payable to the order of E. S. Fowler, one Sept. 18, 1872, and the other Sept. 18, 1873. These notes were secured by a trust deed upon property in Cook County, Illinois. They were, sometime before Oct. 9, 1871, while the Merchants Insurance Company was solvent and doing business, assigned and sold by the payee, E. S. Fowler, to said Insurance Company, which held them at the time of its ceasing to do business, and they thus came into the hands of the assignee as part of the assets of the estate he was to administer.

Moses W. Gray, the appellant, was in April, 1870, and continued to be at the time he filed his bill of complaint in this case, a member of the firm of "Gray Brothers," in which firm he was an equal partner. In April, 1870, the Merchants Insurance Company of Chicago issued a policy of insurance to Gray Brothers, insuring their stock of groceries, for one year, against loss or damage by fire, to the extent of $10,000.00. By renewal, this policy was afterwards extended for another year. In June, 1871, another policy of insurance, in like amount, upon the same stock, was issued to the same parties, by said Insurance Company; and again in September, 1871, a third policy, in like amount, upon merchandize of the same parties in store in a warehouse in Chicago, was issued to them by said Company. Thus, at the date of the fire above referred to, Oct. 8 and 9, 1871, Gray Brothers held policies of insurance issued by the Merchants Insurance Company to the aggregate amount of $30,000.00, and the same casualty which occasioned a total loss by fire, to them, of the property covered by those policies, plunged the Insurance Company into hopeless insolvency and bankruptcy.

After Gray Brothers had made proper proofs of loss, and the Merchants Insurance Company had accepted such proofs, and had become

liable to pay the amount of $30,000.00 to Gray Brothers, pursuant to the terms of the policies held by them, the appellant sought to set off the losses due and payable to his firm, in payment of one of the notes given by Gaylord and himself to E. S. Fowler, and by Fowler transferred to the Insurance Company, claiming that such note, and the sum of $30,000.00 due from the Company to Gray Brothers, constituted mutual debts and credits, under the provisions of the bankrupt law.

His application and offer of set off, being rejected by the assignee, this proceeding was commenced with a view to compel such adjustment as he had offered.

The facts above stated appear in the bill of complaint on pages 2, 3 and 4 of the printed record.

The bill of complaint discloses an attempt, on the part of the complainant, to set-off debts due in different rights; to connect, under the allegation of mutuality, wholly disconnected demands, in respect of which the parties never had any agreement or understanding, and to apply one in satisfaction of the other. It is an attempt to pay the indebtedness, or a part of the indebtedness, of Moses W. Gray and Frederick Gaylord to the Merchants Insurance Company of Chicago, by setting it off against the indebtedness of that Company to Moses W. Gray and Franklin D. Gray. No peculiar equitable circumstances are shown in the bill of complaint, which tend to make the complainant's alleged rights obvious, or to show that he is deserving of the relief in equity which he seeks.

The Bankrupt Act itself throws no light upon the questions involved in the case.

Section XX of that act provides "that, in all cases of mutual "debts or mutual credits between the parties, the account beween them "shall be stated, and one debt set off against the other, and the balance "only shall be allowed or paid." The question is as to whether there

is such mutuality between the debts and credits set forth in the complainant's bill, as brings them within the operation of this section, and further whether the complainant has stated a case in his bill of complaint, which entitles him to the relief he seeks, in a court of equity?

In support of the demurrer to the bill, the following authorities were relied upon in the Circuit Court, and are relied upon here:

I.

English Authorities.

The earliest case which we have found, seemingly in point, is

Medlicot v. Bowes, 1 Vesey, Sr., 207,

decided by Lord Chancellor Hardwicke in 1748.

"There is no case where a debt in one right has been set off against "a debt in another right."

Opinion of Master of the Rolls (Sir Thomas Clarke) in *Whitaker v. Rush*, 1 Ambler, 408.

See *Ex parte Christie*, 10 Vesey, Jr., 105.

In *Ex parte Twogood*, 11 Vesey, Jr., 517, Lord Eldon refused to grant relief in the nature of set-off against a separate creditor of a bankrupt, indebted to the partnership in bankruptcy to a greater amount, though he thought there was much natural equity in the proposition for a set-off. He held that, pursuing the proposition through all its consequences, it would so disturb all the habitual arrangement in bankruptcy, that he dare not do it.

See *Ex parte Blagden*, 19 Vesey, Jr., 465.

In *Addis v. Knight, et al.*, 2 Merivale, 121, the Master of the Rolls said: "Upon looking into the cases which have been cited in support "of the plaintiff's demand (for a set-off,) that of *Stephenson v. Chiswell*, "(3 Vesey, 566) is the only one which I find to be applicable; and, "in the result, that case appears to be rather against the claim than in "favor of it; for the demurrer was allowed. The cases of *Ex parte* "*Stephens*, (11 Vesey, 24,) and *Ex parte Hanson*, (12 Vesey, 346,) "only establish that, under certain circumstances, there may be a set-"off in equity, when there can be none at law. But it is quite clear "that, as at law, a joint cannot be set off against a separate demand, "the same rule prevails in equity, and must continue to prevail, so "long as the present system in regard to joint and separate estates, "subsists."

To the same effect is the opinion of LORD ELDON in *Vulliamy v. Noble, et al.*, 3 Merivale, 618. He mentions a clear and distinct series of transactions in which joint credit has been given, as a particular circumstance justifying the interference of a court of equity, in allowing a set-off against a separate debt.

See *Harvey v. Wood*, 5 Maddock, 459.

In *Cherry v. Boultbee*, 4 Mylne & Craig, 442, it was argued by counsel, that in all cases where the principle of set-off had been applied in the English Court of Chancery, from *Jeffs v. Wood*, (2 P. Wms, 128,) downwards, with the single exception of *Ex parte Man*, (Mont. & Mac., 210,) which was claimed to be of questionable authority, this material circumstance occurred, viz: that, at the time of Bankruptcy, a clear case of set off existed between the parties, which the fact of supervening bankruptcy was not permitted to alter or affect. The Court, (LORD CHANCELLOR COTTENHAM,) held that in its proper

use, the term "set-off" was "applicable only to mutual demands, debts "and credits;" and that "in all the cases referred to, except that of *Ex-* "*parte Man*, the liability to pay the debt, and the right to receive "the money, had been at some time vested in the same person." And he concluded his opinion by overruling the exceptional case of *Ex parte Man*.

In *Freeman v. Lomas*, 9 Hare 114 (side,) VICE CHANCELLOR TURNER says: "I believe, that, upon examining the authorities, it will "be found, that, except under special circumstances, courts of equity "have never allowed cross-demands, existing in different rights, to be "set off, the one against the other."

II.

AMERICAN AUTHORITIES.

See *Duncan v. Lyon*, 3 Johnson's Chy, 358,—where CHANCELLOR KENT reviews the English authorities at length, on the subject of set-off in Equity, and holds, that Courts of Law and Equity follow the same general doctrines on the subject.

Again, in *Murray v. Toland*, 3 Johnson's Chy, 574, (side,) CHANCELLOR KENT says: "in this case, Toland was part owner of the "goods and he held the residue as agent or factor of Meade. He "dealt with the plaintiffs jointly, as a commercial house, and there was no "privity between him and one of the plaintiffs, individually considered. "If there could be any set-off allowed in this case, it ought to be of a joint "demand of the plaintiffs, and not of the separate demand of one of them. "The plaintiffs assumed, and are responsible for those proceeds in their "*joint* capacity. This fact is, of itself, decisive against the alleged right "to retain. *The debt demanded, and the debt to set off, must be mutual,*

" *i. e.—they must be due to and from the same persons in the same* " *capacity.*"

Again in *Dale, et al. v. Cooke*, 4 Johnson's Ch., 13, (side) CHANCELLOR KENT says: " The debts or the credits * * * must be " mutual, and due to and from the same person in the same capacity," and on page 15 (side) in the same opinion, he says: " My conclusion " is, that joint and separate debts cannot be set off in Equity any more " than at law."

" I take the general doctrine as to set-off to be the same in Equity " as at law, though it was administered in Equity long before the stat- " utes of set-off. Joint debts cannot be set off in Equity, any more " than at law, against separate debts, unless there be some other cir- " cumstances calling for the equitable interference of the Court. In " other words, there must be some equitable circumstances to entitle a " party to a set-off, which cannot be reached at law."

Opinion of STORY, J., in *Jackson v. Robinson, et al.*, 3 Mason, 145.

" The general rule in Equity is like that at law, that there can be " no set off of joint debts against separate debts, unless some new " equity justify it. Such an equity may arise under circumstances of " fraud; or where the party seeking relief is only a surety for a debt " really separate; or where there are a series of transactions, in which " joint credit is given with reference to the separate debt."

Opinion of STORY, J., in *Greene v. Darling, et al.*, 5 Mason, 209.

In *Howe, et al. v. Sheppard*, 2 Sumner, 412, JUDGE STORY says: " A several debt cannot be set off against a joint debt; for the debts

" are of different natures and in different rights. This is the estab-
" lished doctrine, and it is founded in reasoning entirely satisfactory.
" * * * Then how does the debt stand as a set-off in equity ?
" The known rule in courts of equity is, that they follow the law in re-
" gard to matters of set-off, unless there is some intervening natural
" equity, going beyond the statutes of set-off, which constitutes the
" general basis of set-off at law. Such a natural equity does arise
" where there are mutual credits between the parties; or where there
" is an existing debt on one side, which constitutes the ground of a
" credit on the other side; or where there is an express or implied un-
" derstanding, that the mutual debts shall be a satisfaction or set-off
" *pro tanto* between the parties."

" In matters of set-off, courts of equity generally follow the law, un-
" less there is some equity attaching to the particular transaction be-
" tween the parties; such as mutual credits."

Opinion of STORY, J. in *Gordon v. Lewis, et al.*,
2 Sumner, 151.

" The jurisdiction of courts of equity in matters of set-off, is very
" narrow, and closely follows that of the law. The mere fact of the
" existence of mutual demands constitutes no ground in equity for a
" set-off, however reasonable it might have been to have allowed it upon
" principles of natural justice. The authorities are the other way.
" I have had occasion to consider this doctrine in various cases, and
" need do no more than refer to the cases of *Jackson v. Robinson*, (3 Ma-
" son, 138). *Green v. Darling*, (5 Mason, 201), *Gordon v. Lewis*, (2
" Sumner, 151), and *Howe v. Sheppard*, 2 Sumner, 412). To justify
" a court of equity in allowing a set-off, there must be some original
" or intervening equity between the parties, beyond the mere fact of
" mutual debts. There must be a mutual credit, founded on a subsist-

" ing debt on the other side, or an express or implied agreement for a " set-off of mutual debts. * * * The sole equity now " set up is the insolvency of John Gordon. But I am not satisfied, " that mere insolvency alone, constitutes a ground for the interference " of the court. On the contrary, it appeared to me, in the case of " *Howe v. Sheppard*, (2 Sumner, 415, 416,) that there was no suffi- " cient authority to establish that doctrine. I am aware of the bearing " of the case of *Simson v. Hart*, (14 John., 63), which, upon its own " circumstances, may have been very properly decided. But if it " meant to assert, as a general doctrine, that mere insolvency of one " of the parties, gives a right in equity to set off mutual unconnected " debts, I am not prepared to say, that it can be sustained as a suffi- " cient authority to bind this Court to that extent, whatever may be my " respect for the learned Judges who decided it."

Opinion of STORY, J., in *Gordon v. Lewis, et al.*, 2 Sumner, 633, 634.

See *Wright, Assignee v. Rogers*, 3 McLean, 229.

See *Dade v. Irwin, Ex'r*, 2 Howard, 383, in which this Court said, the bill of complaint " sets up merely a cross claim or set-off of a debt " arising under wholly independent and unconnected transactions. " Now it is clear that courts of equity do not act upon the subject of " set-off in respect to distinct and unconnected debts, unless some other " peculiar equity has intervened, calling for relief; as, for example, in " cases where there has been a mutual credit given by each upon the " footing of the debt of the other, so that a just presumption arises that " the one is understood by the parties to go in liquidation or set-off of " the other."

See opinion of STORY, J., on pages 390 and 391.

The rule of law, that several debts cannot be set off against joint debts of the contracting parties, " is followed in courts of equity, un- " less some peculiar equities intervene in the particular case, the rule " being that equity on this subject, follows the law."

Vose v. Philbrook, 3 Story, 335.

" The mere existence of cross-demands will not be sufficient to jus- " tify a set-off in equity. Indeed, a set-off is ordinarily allowed in " equity only when the party seeking the benefit of it can show some " equitable ground for being protected against his adversary's demand— " the mere existence of cross-demands is not sufficient."

2 Story's Equity Jurisprudence, § 1436.

" At law, and in bankruptcy, and indeed in equity generally, there " can be no set-off of joint debts against separate debts, unless there " be some special agreement between the parties to that effect, or some " equitable circumstances, creating it in the particular case."

Story on Partnership, § 395.

In *Williams v. Brimhall*, 13 Gray, (Mass.) 462, it was held that a debt due from one partner cannot be set off in an action by the assignee in insolvency of the firm, on a debt due to the partnership.

" The existence of mere cross-demands is no ground for this relief. " Nor does the fact of insolvency and assignment * * * " of itself, raise an equity of set off, although it is a circumstance which, " in connection with the fact of the existence of a mutual credit, will " justify such set-off. Although there is much doubt thrown over this " branch of the law, and conflict of authorities, yet we think the true " rule to be, that the debt must have existed as a mutual credit, at the

" time of the assignment, to authorize the set-off. The equity must " attach to the demand, and not to the person of the debtor. * * " It has been repeatedly said that, in the matter of set-off, courts of " equity follow the law, and will not allow set-off in cases where the " law will not, unless there be special equities growing out of the trans- " action itself, requiring it."

Opinion of MARTIN, CH. J., in *Lockwood v. Beckwith*, 6 Mich. 175.

" Cross-demands existing in separate rights, are not (except under " special circumstances) allowed to be set off."

Waterman on Set-off, &c., p. 187, § 148.

In *Riddick v. Moore*, 65 North Carolina, 382, it was held that, to authorize an equitable set-off, some equitable grounds must be shown, why the party claiming it should be protected against his adversary's demand; that the mere existence of cross-demands, or the insolvency of the opposite party, is not sufficient for that purpose. The court (PEARSON, C. J.) said: " Upon the weight of authority, without ref- " erence to all of the cases which are cited and commented upon in the " text books, we deem it enough to say, the preponderance is decidedly " against the idea that insolvency can constitute a ground of equity. " In all the cases in which the allegation is made, with one or two ex- " ceptions, there is some distinct equity, and the insolvency of the " other party is relied on, only as a make-weight, and by way of troub- " ling the court. Story, in his Equity Jurisprudence, Sec. 1436, says, " in treating of set-off allowed in equity, ' whenever there is a mutual " ' credit, between the parties, touching the debts, (that is, when the " ' debts are in any way connected) a set-off is, upon that ground alone, " ' maintainable in equity; although the mere existence of mutual " ' debts, without such a mutual credit, might not, even in a case of

" 'insolvency, sustain it.' That judicious author, Adams, in his " Treatise on Equity, p. 223, referring to the subject, says, there must " be some equitable element, such as trust or fraud, and does not even " refer to 'insolvency' as an element of equity. In *Ransom v. Sam-* " *uel*, 1 Craige and Phillips, 161, 177, which seems to be the control- " ling case, after the plaintiff's counsel had taken ground that the cir- " cumstance of the defendant's being out of the jurisdiction, and of his " insolvency, furnish additional reasons why the court should afford relief, " for if the defendant be allowed to recover, the court will have lost the " power of doing justice between the parties; the Lord Chancellor in- " timated to the defendant's counsel, that it was unnecessary for him to " address himself to the circumstance of the defendant's being out of " the jurisdiction, and insolvent, inasmuch as those circumstances could " give the plaintiff no equity. The argument is then continued upon " other matters, and the Chancellor concludes by saying: 'We speak " 'familiarly of equitable set-off, as distinguished from set-off at law; " 'but it will be found, that the equitable set-off exists in cases where " 'the party seeking the benefit of it, can show some equitable ground " 'for being protected against his adversary's demand. The mere ex- " 'istence of cross-demands, is not sufficient.' He had before put in- " solvency out of the question; so that disposes of our case; for the " defendant has nothing to stand on except the existence of cross-de- " mands, and the insolvency of the plaintiff."

See opinion of DRUMMOND, J., in *Hitchcock v. Rollo, Assignee, &c.* 6 Chicago Legal News, p. 9, of date *Oct.* 4, 1873.

See *Flint v. Tillman, Adm'r*, 2 Heiskell (Tenn) 202.

III.

Consideration of Authorities cited by Appellant.

First. It is claimed upon the authority of certain cases in Pennsylvania, that one partner, with the assent of his co-partner, may use a joint claim by way of set off or equitable defence.

These authorities must be considered as inapplicable to cases arising in the Courts of the United States, under the Bankrupt Law, after the repeated decisions of the different Circuit Courts of the United States, which we have cited, and after the case of *Dade v. Irwin, Ex'r, &c., supra*, in this Court. This case alone should control the question, as it seems to us, apart from the long line of English and American decisions, which are above cited.

The equities and claims of the general creditors of The Merchants Insurance Company, under the Bankrupt Law, are certainly equal to those of the firm of "Gray Brothers," or any member of that firm, in and to all the assets of the bankrupt, to which no peculiar equity has attached.

Holbrook v. Receivers of American Fire Ins. Co.,
6 Paige Chy., 220.

Opinion of *McCoun, V. C.*, p.p. 225—6.
" *Walworth, Chancellor*, p. 232.

Second. The appellant cites *Pond v. Smith, et al.*, 4 Connecticut, 297, in support of his proposition for a set-off. It is sufficient to say that so far as that case may be regarded, in any aspect of it, as an authority in his favor, it is of no force, it having been clearly overruled by

Palmer v. Green, 6 Conn., 14.
Francis v. Rand, 7 Conn., 220.
Pitkin v. Pitkin, 8 Conn., 325.
Atkins v. Churchill, et al., 19 Conn., 393.
See also *The Eastern Bank v. Capron*, 22 Conn. 639

Third. It is claimed that "Equity will lend its aid to support the right "of set-off against a bankrupt or insolvent, whenever justice requires "its interposition." We do not deny that where equity once acquires jurisdiction, by reason of special equitable circumstances surrounding a particular case, as in case of fraud, mistake, or peculiar hardship under the strict rules of Law, it will retain such jurisdiction to the extent of settling the rights of all parties concerned, even to the extent of upholding and insisting upon the set-off of opposing claims—but even then, that there must be mutuality of debts or mutuality of credits.

It will be found upon examination of the cases cited by appellant under this head, that all had some special equities, or some element of fraud, which controlled the decision.

Lindsay, et al. v. Jackson, 2 Paige Chy., was not such a case as this. There it was not sought to set off debts due in different rights. The claims had the merit of mutuality.

In *Tucker v. Oxley*, 5 Cranch, 34, the ruling of a majority of the court was expressly made under the peculiar wording of the bankrupt law of 1800, and the case is an exceptional one. The present bankrupt law contains provisions as to the distribution of the joint and separate estate of partners, not contained in the law of 1800.

Opinion of DRUMMOND, J., in *Hitchcock v. Rollo, Assignee, &c.*, 6 Chicago Legal News, p. 9, date Oct. 4, 1873.

The later case of *Dade v. Irwin, Ex'r. &c.*, 2 Howard, 383, cited by us, seems to settle the doctrine of this court on this subject.

The case of *Ex parte Quintin*, 3 Vesey, Jr. 248, is commented upon by the Editor of Sumner's edition of Vesey's Reports in a note follow-

ing the opinion of the Lord Chancellor, LOUGHBOROUGH, as an exceptional case, and as one not much to be approved.

In commenting upon this case in *Ex parte Twogood*, 11 Vesey, Jr., 519, LORD ELDON says: "In the case of *Ex parte Quintin*, the partnership debts were actually paid. I do not quite understand it. But, if there are debts which cannot be set off at law, can it be said that all the affairs of the bankruptcy are to be suspended, until all the accounts are cleared, in order to see what rights of set-off there may be in the result? That should have been considered before that case was determined. The consequence will be that, where there are joint and separate debts, which cannot be set off against each other at law, in every bankruptcy the proceedings must be suspended, till the accounts are taken, and it is seen what the joint estate will pay, and what the separate will pay. * * * * * * * * The circumstance, that there was a great number of other separate creditors, was not, in the least, attended to in that case."

Thus the case of *Ex parte Quintin* was overruled, and is no authority.

See note of Mr. Sumner to *Ex parte Christie*, 10 Vesey, Jr., 105.

In *Ex parte Hanson*, 18 Vesey, Jr., 232, the joint debt, in question upon the claim for set-off, was nothing more than a security for the separate debt. This fact was held to constitute a special equitable circumstance in the case, on account of which the jurisdiction of the court could be sustained, and the relief of set-off granted. The reason for this ruling is sufficiently obvious without further comment.

In *Ex parte Edwards*, 1 Atk., 100, decided by LORD HARDWICKE, in 1745, the Chancellor himself expressed grave doubts as to his action, in the meantime reserving all consideration of the real question in-

volved until a report should be had from the commissioners in bankruptcy, to whom the matter was referred.

In *Sarchet v. Sarchet*, 2 Hammond, (Ohio) 320, the court expressly said: "It is a cause of mutual credits due to and from the same persons in the same capacity." That being granted, the case was within the principle of law, giving the right of set-off.

Collins v. Farquer, 4 Littell, (Ky.) 154, does not appear to be an authority in support of the appellant's argument, except as a *dictum* of the court may be construed in his favor. The court says that the assumption that the Chancellor has jurisdiction in matters of set-off, concurrent with the jurisdiction at law, would be hard to establish as a general rule, and that such jurisdiction has not been supported by the current of authorities, except in special cases, mentioning insolvency, however, as a special case.

In *Robbins v. Holley*, 1 Monroe, (Ky.) 194, the relief of set-off was denied because the facts which gave the complainant the right to go into equity, were not proved to have existed before the other party acquired his rights, though the court again says, that insolvency of one party, in general, warrants a court of equity in taking cognizance of a cause for the purpose of setting off demands, which could not otherwise be decreed in a court of equity.

Prior v. Richards' Adm'r, 4 Bibb., (Ky.) 356, went no further than to permit a judgment at law *against* an administrator, to be set off against a judgment obtained *by* the administrator.

We submit that in these Kentucky decisions, as in the case of *Ex parte Quintin*, *supra*, the rights of separate creditors were not in the

least considered; the cases do not come under the bankrupt law; the decisions, so far as they could affect the question at bar, are mere *dicta*; and they must be considered as exceptional cases, not warranted by the weight of authority in this country and in England.

Lanesbrough v. Jones, 1 P. Wms., 326, was a case where there were distinct mutual credits between the parties, *i. e.*: A. owed B. and B. owed A. Held that a set-off was allowable though one of the parties was a bankrupt. We do not dispute the equity or good sense of this ruling. The court adds, however: "But it seems, if A. and B. "are joint traders, and J. S. owes A. and B. on their joint account, "£100, and A. owes the said J. S. £100 on his separate account, J. "S. cannot deduct so much as A's proportion of the £100 comes to, "out of the joint debt; for that the co-partnership debts of A. and B. "are to be first paid before any of the separate debts: but if there be "a surplus beyond what will pay the partnership debts, then, out of "A's share of the surplus, J. S. may deduct the separate debt of A."

We are unable to see how this authority can possibly aid the appellant.

Jeffs v. Wood, 2. P. Wms., 129, goes no further than to decide, that equity will grant a set off under special circumstances, and in case of mutual demands, where the balance only is the debt.

The Receivers, &c. v. The Paterson Gas Light Co., 3 Zabriskie, 283, holds merely, that the debtor of an insolvent Corporation, has the same equitable right of set-off against a claim of the receivers, appointed under the New Jersey statute to prevent frauds by incorporated companies, that he had against the corporation at the time of its insolvency. We agree with the reasoning of the Court, that there is no equality, and no equity in putting a debtor of the corporation, "*who*

" *has a just and legal set-off as against the corporation, in a worse po-*
" *sition, and the creditors in a better position, by the failure of*
" *the corporation, and the appointment of receivers.*" But we do object to the converse of the proposition, as contended for by the appellant, viz: that there *is* equality and equity in putting a debtor of the corporation, who has *not* a just and legal set-off as against the corporation, in a better position, and the general creditors in a worse position, by the failure of the corporation, and the appointment of an assignee in Bankruptcy.

The case in question, as stated by the Judges who delivered the opinion of the court, was one of mutual indebtedness, where the demands were ascertained and unquestioned on both sides—there being an accepted draft as the subject matter of set-off, on one side, and a deposit in bank as the subject matter of set-off on the other—the parties and interests being identical, and the mutuality perfect. Here was clearly a case for a set-off at law, and the relief was, as it well might be in such a case, afforded in an action at law, under a notice of set-off, filed with the pleadings, without the necessity of a resort to a court of equity. The distinctions between this case and the one at bar are obvious.

The final case cited by counsel for appellant is *Ex parte Stephens*, 11 Vesey, Jr., 24. In referring to that case, the Chancellor who decided it (Lord Eldon) ten years afterwards said: " Upon the case of " *Ex parte Stephens*, I have heard doubts, entitled to considerable re-" spect, at least as to the length I am supposed to have gone in that " instance; and, but for the fraud, I should have doubted much, " whether that decision was right."

Ex parte Blagden, 19 Vesey, Jr., 467.

Ex parte Stephens was also commented upon in *Addis v. Knight, et al.*, 2 Merivale, 121, cited by us, *supra*.

We respectfully ask the Court, in view of what seems to us the weight of authority applicable to the case, to affirm the decree below, dismissing the appellant's bill of complaint, upon defendant's demurrer, for want of equitable jurisdiction.

A. M. PENCE,

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Chicago, Nov. 20, 1873.